No. 7879.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Cleve W. Van Dyke,
Appellant,

vs.

Bascom Parker,
Appellee.

BRIEF OF APPELLEE.

Appeal From the United States District Court
for the District of Arizona.

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In discussing the questions involved in this case, the appellee will follow in a general way the several points presented by the appellant under appropriate headings. Some of the questions which the appellant seeks to introduce are not regarded by us as involved in the case at all, but both as a matter of caution and of courtesy to the Court and opposing counsel, they will be briefly discussed.

I.

Nature of the Case.

The appellee accepts generally appellant's statement headed NATURE OF THE CASE as correctly setting forth the various proceedings in the court below. The opinion of the District Court upon the demurrer to the second amended complaint speaks for itself, however, as to the reason upon which that court based its order overruling the demurrer as to the defendant Van Dyke.

II.

Statement of Facts.

We cannot, however, in all respects concede the correctness of appellant's STATEMENT OF FACTS. This statement is made rather upon the contentions of the appellant than an unbiased statement of the facts shown by the evidence. It assumes the correctness of the testimony of Mr. Van Dyke and other witnesses for the defendants, even though there is objection that the lower court disregarded them when they were in conflict with the evidence introduced by the plaintiff. It assumes as facts the truth of the statements, matters or otherwise in the long letter written by Mr. Van Dyke on January 1st, 1927. The statement that the Calhoun Timber Company was one of the promotions of the appellee, though wholly unimportant, rests upon the statement contained in that letter; that Van Dyke, Smith and Lubiens were each to pay his pro rata of the purchase price, is also based upon the testimony of Mr. Van Dyke which is contrary to the testimony of Mr. Parker, and which presumably was not accepted by the Court. Again, however, this is unimportant: The notes were signed by Van Dyke and Smith, who alone were liable for their payment. If there were any oral understandings varying the plain terms of those notes, they could not be shown in evidence and could not affect the question of liability under the familiar rule that an agreement in writing may not be varied by parol evidence. The statement that the appellant and his co-defendant Smith made a settlement with the St. Ansgar Bank is based entirely upon the testimony of Mr. Van Dyke and assumes the correctness of that testimony. There is no evidence that Mr. Parker knew anything about any such settlement or had anything to do with it. It certainly

could not bind him in the absence of at least knowledge on his part that it had been made and his acquiescence therein.

The facts involved in this case are few and comparatively simple. Mr. Parker sold his stock in the Calhoun Timber Company and took in part payment thereof three notes of $5,000.00 each signed by Cleve W. Van Dyke and Hoval A. Smith. One of these notes was paid, the other two were not, nor has either of them ever been paid except that $1,000.00 in two payments of $500.00 each was made upon each of the notes, as testified to by Mr. Parker, and as found as a fact by the Court. About January 1st, 1927, Mr. Parker appeared at Miami, Arizona, where Mr. Van Dyke resided. On that day Mr. Van Dyke called in his secretary and dictated an instrument which has been designated in the record as Exhibit 4. The signature of Mr. Van Dyke was typewritten in that instrument, and a carbon copy, as it is ordinarily called, though we contend that it is a duplicate original, was handed to Mr. Parker by Mr. Van Dyke. Later, in April, 1927, Mr. Van Dyke and Mr. Parker met in the City of Los Angeles, California, and discussed the matter of payment of these notes. This conversation, as Mr. Parker testified, led to the payment of $1,000.00 on each of the notes. The parties differ as to what was said and done at this conversation and other matters connected with it. The finding is in favor of the version stated by Mr. Parker. Later the notes were sent to Mr. Graham Foster, an attorney practicing in Globe, Arizona, who subsequently brought suit upon them. Demurrer to the original complaint was filed and later sustained, and leave given to amend. The second amended complaint was the plaintiff's pleading upon which the case was set

for trial. This pleading asserted that Mr. Van Dyke had been without the limits of the State of Arizona for a sufficient time to prevent the statute of limitations running, assuming that it was tolled by the instrument of January 1st, 1927. The notes themselves were in the possession of Mr. Foster when the suit was commenced and were copied into both the original and amended pleadings. Subsequent to the commencement of the action Mr. Foster died, and the present counsel for the appellee were thereafter employed. Evidence is conclusive that the notes were lost and that the copies as set forth in the pleadings were correct copies. Th allegation that Mr. Van Dyke had been without the State of Arizona long enough to prevent the statute of limitations running, if it was tolled by the instrument above referred to, was established and found by the Court.

Mr. Parker testified that he borrowed money on these notes, that he subsequently received them back later from the bank and that he afterwards kept them until he sent them to Mr. Foster, through his attorney, Mr. Proctor. Just when they were returned by the bank to him does not appear, but he had them in his possession for at least some time prior to their being forwarded to Mr. Foster. Mr. Proctor, his attorney, had them for some time before they were so forwarded. [Tr. pp. 147-149.] The Court has found that the notes were lost since the commencement of the action and could not be found after diligent search and inquiry; that the evidence establishes the form and language of the notes as set forth in the pleadings and in the findings. [Tr. pp. 112-113.] The Court also finds that at the time of the commencement of this action the plaintiff was and still is the owner and holder of the notes and that they have not been paid, except in the sum of $1,000.00 on each of the notes. [Tr. p. 111.]

III.
Issues.

We are not able to agree with counsel for the appellant as to the issues for determination. (Appellant's Brief, pp. 34-35.) The second, third, sixth, seventh and eighth are involved. The additional issue may be stated as whether the instrument of January 1st, 1927, was sufficient to arrest the running of the statute of limitations of Iowa. The questions as we see them are simply these: Is the instrument of January 1st, 1927, sufficient to toll the statute of limitations, whether of Arizona or of Iowa? To our minds that is the one question in the case and everything else is merged in or involved in that one question. If Exhibit 4 is sufficient to toll whatever statute of limitations is applicable, the judgment was properly rendered for the plaintiff; if not, it should have been rendered for the defendant.

IV.
The Demurrer.

Counsel devote several pages of their brief, citing many authorities, to the effect that the question of limitation may be raised by demurrer. Undoubtedly, if the complaint shows on its face that the cause of action is barred by limitation, that question may be raised and determined upon demurrer. We have never contended otherwise, and could not in view of the well settled rules on the subject. The question whether the Court erred in overruling the demurrer brings us back to the question whether the memorandum or writing of January 1st, 1927, is sufficient to toll the statute and that is discussed elsewhere.

V.

The Ownership of the Notes.

We cannot appreciate the argument of our learned friends based upon the question that they submit as an issue whether the appellee was the holder in due course of the promissory notes sued upon. If by that is meant that he is entitled to the protection afforded an innocent purchaser under the law merchant we concede, of course, that he is not.

This suit is between the original parties to the note. As stated by counsel, the notes do not seem to have been endorsed by anybody. They were neither endorsed to the St. Ansgar Bank nor endorsed back by that bank. If they were pledged as collateral security, the pledge was merely by delivery. Whatever the rights of the bank may have been, or whatever the terms of any arrangement between Mr. Parker and the bank may have been, when the notes were returned to Mr. Parker, they stood as they were originaly, subject to all defenses that might be made by the maker and subject only to those. The appellee does not claim to be an innocent purchaser in the sense that term is used in the law merchant or the uniform negotiable instruments law. He claims the same rights, no more and no less, he would have had if the notes had never passed out of his possession. So we shall take no time to discuss any question concerning a purchaser in due course, or similar questions that are sometimes involved in suits on negotiable instruments.

The finding of the Court [Tr. p. 103] was that at the time of the commencement of this action the plaintiff was and still is the owner and holder of the notes sued upon. The evidence was without contradiction that at the time of the commencement of the action, and for some time before, Mr. Parker was in possession of

these notes, they having been returned to him from the St. Ansgar Bank. Whether he had paid the debt which he owed that bank, or whether it returned them under some arrangement between itself and Mr. Parker, or whether they were simply handed back to him, does not appear and makes no possible difference. Possession is prima facie evidence of ownership, and the plaintiff being shown to have been in possession of them there was sufficient evidence of ownership to warrant the finding of the Court that he was the owner.

It will be noted that this action was not brought upon lost instruments in the ordinary sense that that expression is used. The instruments at the time of the commencement of the action had been in the possession of Mr. Parker. He had delivered them to Mr. Proctor, his attorney in Elkhart, Indiana. By that gentleman they had been forwarded to Mr. Foster, who, after some slight delay, brought suit upon them. At the time of the commencement of this action, and for at least some time thereafter, they were in the possession of the plaintiff through his attorney, Mr. Foster. Owing to Mr. Foster's unfortunate death they could not be found. The endorsement of the notes was not necessary since the plaintiff was the original payee and the redelivery by the bank, even assuming that title had passed, re-vested in Mr. Parker the ownership of the notes. Being in Mr. Parker's possession at the time suit was commenced, that fact constitutes *prima facie* evidence of his ownership. The fact that they were subsequently lost imposed no duty upon the plaintiff, except to prove their loss and the form and language of them, and when that was done, the presumption arising from possession was as effective as if the notes had been physically produced.

8 *C. J.* 1003, Sec. 1309 *et seq.*

VI.
The Loss of the Notes.

Mr. James R. Mallot, a practicing lawyer of Globe, Arizona, testified that he knew Mr. Foster in his lifetime. That after Mr. Foster's death, Mrs. Foster got in touch with him. He was requested by her to look over deceased's files and take over his business. In response to this reuest, he took over the files in the case of Parker against Van Dyke and Smith. Later he turned the file over to the present counsel for the appellee, and, upon observing that the notes were missing from the file, called Mrs. Foster's attention to this, and the two of them made every effort to locate the missing notes. There is nothing in the testimony to indicate that the notes were delivered to Mrs. Foster, or taken away by her. The loss is shown as completely as it would be possible under the circumstances, and the search was sufficient to satisfy any reasonable mind that they could not be found. Indeed, the apparent lack of confidence of appellant's counsel in their contention that the foundation was not made is shown by the finding of fact that they requested the Court to make as follows:

> "X. That both of the promissory notes set up in the plaintiff's second amended complaint were lost after the commencement of this action and prior to the filing of his answer therein by the defendant, Cleve W. Van Dyke, and same cannot be found after diligent search and inquiry, but that the evidence establishes the form and language of said notes as set forth in plaintiff's second amended complaint." [Tr. p. 94.]

VII.

The Notes as Copied in the Second Amended Complaint Were Correct Copies.

The testimony of Mr. Parker [Tr. pp. 145-146], of Mr. Parker [Tr. pp. 149-150], the testimony of Carson P. Parker [Tr. pp. 156-157], the testimony of Mrs. Annie E. Parker, wife of the plaintiff [Tr. pp. 158-159], the testimony of Mary Riener, stenographer employed by Mr. Proctor [Tr. p. 160], the testimony of Miss Chloe Dinehart [Tr. pp. 161-162], the testimony of Miss Frances Giacoma, the stenographer who was employed by Mr. Foster and who copied the notes into the complaint [Tr. p. 163], and finally, the testimony of Mr. Van Dyke himself that he had read the notes set out in the second amended complaint on pages 2 and 8 and that he and Mr. Smith signed the notes in Chicago, Illinois, on October 20th, 1917 [Tr. p. 139], ought to be sufficient to establish the correctness of the copies as set forth in the original complaint and the second amended complaint. In fact, the finding that they were not correct copies would be contrary to all the evidence on the subject, including the testimony of the appellant himself.

VIII.

The Complaint Does Not State a Defense and Then Fail to Avoid It.

The second amended complaint sets forth the letter or instrument of Mr. Van Dyke, not as a statement of the facts contained in it, but as an admission of the justness of the debt and as being an instrument of such a character as to stop the running of the statute of limitations. There was no statement of any fact with reference to the various things inserted by Mr. Van Dyke in the instrument. The making of the instrument and its terms, so far as it related to the justness of the debt, was pleaded to avoid the effect of the statute of limitations. There was so little merit in this idea that a defense was pleaded in the complaint and then not negatived that attention is not even called in the appellant's brief in the answer that was actually made in this case. Indeed, if Mr. Van Dyke had pleaded in his answer the exact language of his letter, it would not have constituted a defense. While he wrote at considerable length, all he said was that after the first note was paid, the other two notes were taken over by the St. Ansgar Bank and Mr. Lubiens, and later on one of them was sent for collection by the St. Ansgar Bank and that he refused to pay the same at the time because he had already paid the share due from him. His refusal to pay the note was based upon the ground that he did not owe the money in that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due. Later on in his letter, he says that an agreement was reached between ourselves (meaning himself and Mr. Smith and the St. Ansgar Bank) and that in order to avoid litigation, he (meaning him-

self and Smith) agreed to a settlement between the bank and ourselves with the understanding that all notes and obligations were to be included within this settlement. Absent any agreement to this so-called settlement by Mr. Parker, and the evidence does not even show that he had any knowledge of such transactions and was certainly not a party of them, these matters would be no defense whatever to a suit on the notes by Mr. Parker. But the whole purpose of pleading the instrument in full is to show its character as tolling the statute of limitations and for no other purpose whatever.

Of course, cases may be cited under the old equity practice where it was necessary, if an affirmative defense is pleaded, for the complainant to amend his bill setting up the assertion of a defense and not denying or avoiding it, but that, of course, is not this kind of a case.

We have examined the authorities cited by the appellants in support of their contention that when the complaint assumes to state a valid defense, it might avoid the confession (App. Br., page 42).

The first case cited is not available. The case of *Western Union v. Yopst,* 3 L. R. A. (O. S.) 224, reported also in 118 Ind, 248, 20 N. E. 222, was brought against a telegraph company to recover a penalty for a breach of duty. A statute of Indiana provided that telegrams should not be received or delivered on Sunday, nor contract for the transmission of the message on Sunday unless in the case of necessity. The effect of this statute was to make the receipt or delivery of a telegram on Sunday, and any contract based on the supposed duty of the telegraph company invalid unless the necessity for sending or receiving the telegram was re-

ceived on Sunday and did not allege any necessity for receiving it on that day. In such case it was held that plaintiff must show, in order to make a valid contract for the delivery of the message, whether it came within the statutory exception of being a matter of necessity, and unless he did so, his complaint was bad.

The case of *Bowlus v. Phoenix Insurance Company,* 133 Ind. 106, 32 N. E. 319, was based upon an insurance policy in which, without going into the details of a somewhat lengthy opinion, it may be said that where the complaint showed a violation of the terms of the policy, it must also negative the existence of such violation or confess and avoid it.

The last case cited, *National Bank v. Carpenter,* 101 U. S. 567, was an action in equity where it was held that it was necessary to plead matters in avoidance of the statute of limitations when, from the allegations of the bill, it would appear to have run, or to void the defense of laches when that was to be inferred from the language of the bill.

Clearly these authorities have no application to the present case. The only defense that could be claimed to be asserted in the complaint, was the bar of the statute of limitations and in the second amended complaint the instrument of January 1st, 1927, was pleaded as tolling the statute and doing away with what might otherwise be a fatal objection to the complaint on account of the lapse of time since the notes became due. The only question that can arise is the question of the sufficiency of the instrument of January 1st, 1927, to toll the statute of limitations, and that brings the consideration back to that question which will be discussed in its proper place.

We call attention to the answer of the defendant, both as showing that no question of this kind was in the mind of the defendants' counsel, or that the question now attempted to be presented has any merit. The answer as finally submitted, pleads to each cause of action the four-year statute of limitations of Arizona, followed by a general denial, then alleges that the defendant Hoval A. Smith and R. C. Lubiens were engaged in the promotion and organization of a corporation for the purpose of operating certain properties in the State of Florida, that they agreed to purchase the interest of plaintiff in said corporation, a part of the consideration being the three notes for $5,000.00 each, two of which are involved in this case, and then alleges that the plaintiff Smith, Lubiens and the defendant agreed with each other that each of the purchasers would pay the sum of $5,000.00, with interest, and no more, and that the plaintiff agreed to accept payment accordingly. That Lubiens declined, for a given reason, to sign the notes, and thereupon Van Dyke and Smith signed all three of them, one of which was thereafter paid, and then pleads the alleged settlement of any claim based on the two unpaid notes for the sum of $1,000.00 each. There was not a particle of evidence in the record that the plaintiff Parker ever entered into such arrangement, or even knew of it. Even treating Mr. Van Dyke's letter as evidence, it would simply show that he, Smith and Lubiens made arrangements between themselves, of which Parker had no knowledge, and to which he did not consent. Of course, the general denial in the answer amounted to very little under the facts shown by the evidence. Certainly it did not deny the execution of the notes because not verified in accordance with the Arizona statutes, and because the defendant expressly admitted

the signing of the notes and the general denial could present no other issue except possibly the ownership of the notes, and that is discussed elsewhere. The alleged arrangement between the defendant, Smith and Lubiens could not bind Mr. Parker and if it was oral, could not even be shown in evidence because it would obviously tend to vary the terms of the written instruments, that is, the two notes sued upon.

IX.

The Signing of the Memorandum in Writing.

We have in this action a memorandum in writing introduced by the plaintiff, defensive to the plea of the statute of limitation interposed by the defendant Van Dyke. The memorandum is typewritten, conceded to have been dictated by Van Dyke in his office in Miami on New Years Day to a stenographer long associated with him in his office, called especially for the purpose of reducing to writing Van Dyke's statement of the situation which he intended to transmit to defendant Smith.

This memorandum contains not only Van Dyke's initials and the initials of his stenographer, but his name fully written out at a place upon the page invariably used as the place for signing.

Our state code provides (Sec. 2068) that when an action is barred by limitation, no acknowledgment of the justice of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law, unless such acknowledgment be *in writing* and *signed* by the party to be charged thereby.

We take it that there is no question but that this memorandum is in writing and shall confine our remarks upon this phase of the evidence to the word "signed."

We wish to make clear to the Court our interpretation of the word "signed". It is quite different from the word "subscribed". The word "subscribed" denotes the action of the author of a written instrument himself and not the adoption of any other signature than his own handwriting.

Now, keeping in mind that Mr. Van Dyke took this typewritten paper from his stenographer and handed it to Mr. Parker, the plaintiff, in his own (Van Dyke's) office; that Van Dyke received it directly from the hands of his stenographer; that it was his own statement in writing, and bore his name in typewriting at the end of the communication, there is left then, we take it, but one question concerning the paper, and that is, "was it *signed* by defendant Van Dyke?"

The Courts have very plainly set forth the significance of the word "signed" and we call attention to a few of the decisions.

> "The word 'subscribed' is more restricted than the word 'signature'. The word 'signature' in its origin involves merely a sign, the word 'subscribed' involves a writing. The word 'signed', as a verb, has several shades of meaning and hence a statutory requirement that an instrument shall be 'signed' by some person or officer to make it complete is much more general and comprehensive than a similar requirement that such an instrument or pleading must be subscribed by a person or officer. On the same principle, the signing of a written instrument has

a much broader and more extended meaning than attaching his written signature to it implies. When a person attaches his name, or causes it to be attached to a writing by any of the known methods of impressing his anme upon paper with the intention of signing it, he is regarded as having 'signed' in writing."

Hagen v. Gresby, 34 N. D. 349, 159 N. W. 3, 5, L.R.A. 1917 B, 281.

"The printed name of the seller on his order blanks, if adopted by him as his signature, is sufficient signing of the memorandum to comply with the statute of frauds."

Pearlberg v. Levisohn, 182 N. Y. Supp. 615.

"Where at the time of the purchase of goods, defendant or his authorized agent delivered to plaintiff a bill, which under defendant's printed name, and as filled out on the typewriter, fully described and stated the price of the goods sold to plaintiff's assignor, it was a memorandum of sale 'signed by the party to be charged, or his agent in that behalf', as required by the statute of frauds."

Cohen v. Wolgel, 176 N. Y. Supp. 764.

"Name of seller of flour, printed at top of order blank, filled out by its agent, held as 'signature to memorandum' satisfying statute of frauds as to sale of goods."

Wright v. Seattle Grocery Co., 105 Wash. 383, 177 Pac. 818, 820.

"Printed signature attached to an interest coupon payable to bearer is sufficient; signature including any name, mark or sign written with intent to authenticate any instrument or writing."

Toon v. Wapinitia Irrigation Co., 117 Ore. 374, 243 Pac. 554.

"Signature may be written by hand, or printed; or stamped; or typewritten; or engraved; or photographed; or cut from one instrument and attached to another . . . and it has been held that it is immaterial with what kind of instrument a signature is made."

58 *C. J.* 729, Par. 17.

"The rule is well settled, both in England and in the United States, that an act done by a person in the presence of another and by his direction, or with his consent, as the signing or execution of a sealed or written instrument, for example, is not regarded as an act of an agent, but is the direct act of the person by whose direction it is done."

Pierce v. Dekle, 61 Fla. 390, 54 So. 389 (Fla.).

"When a subscriber's name is written for him by another in his presence and by his parol authority, the act is deemed to be his as much as if he had done it in person, and the person actually writing the name is regarded, not as an agent, but as a mere instrument or amanuensis."

Ledford v. Hubbard, 219 Ky. 9, 292 S. W. 345.

X.

The Adoption of the Typewritten Signature.

There is evidence to sustain the finding that Van Dyke adopted as his signature the typewritten signature appended to the instrument of January 1st, 1927. Of course, it is stating a mere truism to say that the findings of the Judge of a Federal Court in a law case tried without a jury have the effect of a special verdict to the jury and that every statement made in the evidence and every legitimate inference therefrom which even tends to support the finding is sufficient to sustain it. Consider the circumstances of the writing of this instrument. Mr. Parker had come to Miami, Arizona, to demand payment of his notes. As Mr. Van Dyke himself said, he arrived in Miami and asked a settlement of the notes, identifying them, which, as he later said formed the basis of a demand on the part of Mr. Parker for payment at this time. Mr. Parker testified that he saw Mr. Van Dyke on or about the 1st day of January, 1927, in his office at Miami and he had considerable talk about the payment of these notes, and thereupon and on that day Mr. Van Dyke dictated the letter or instrument (Exhibit 4); that Mr. Van Dyke told him he supposed these notes had been paid and he understood the bank still had them, whereupon Mr. Parker said, "You see they don't have them." Then after attempting to converse with Mr. Smith over the telephone, he dictated the letter and said that he would not pay what he, Van Dyke, owed the St. Ansgar Bank until they took up the Parker notes. [Tr. pp. 174-177, inc.] Mr. Van Dyke testified to the dictating of the letter and to the conversations he had with Mr. Parker about the notes. [Tr. pp. 190-193 inc.] It is not without sig-

nificance that nothing was said, according to the testimony of both parties, about the notes being outlawed or barred by the statute of limitations in the conversation leading up to the writing of this letter, and no claim was made by Mr. Van Dyke that the notes were not just debts and should not be paid or that there was any defense to them whatever. The letter negatives any such idea. It says they were unpaid; that Parker was demanding what was right and legitimate. He then dictated the letter in the presence of Mr. Parker. The stenographer not only placed Mr. Van Dyke's initials, followed by her own on the paper, but typed also the name "Cleve W. Van Dyke"; then, when it was completed, Mr. Van Dyke handed to Mr. Parker the so-called carbon copy of the letter, but which was really an original. [Tr. Record p. 175.] Mr. Parker testified that he dictated no portion of the letter and did not suggest a word of it. [Tr. p. 189.] Mr. Van Dyke testified that Mr. Parker dictated portions of it. [Tr. p. 190.] The finding of the Court absolutely shows, and there was sufficient evidence to sustain it, that Mr. Van Dyke himself dictated and wrote the letter and Mr. Van Dyke agrees with Mr. Parker that when the letter was finished the carbon copy was handed to Mr. Parker. [Tr. p. 191.] What was the object of handing this letter to Mr. Parker? Not for the information of Mr. Smith, as Mr. Van Dyke testified that he never sent the letter to Mr. Smith, and it is inferable that he had no intention of doing so. He wrote it for the benefit of Mr. Parker. He never wrote his signature with pen and ink on any copy, but he handed the duplicate to Mr. Parker as a completed instrument and as Mr. Parker's copy. The case is not brought within the effect

of some of the decisions that a communication to a third party, not brought to the attention of the holder of the indebtedness, is not sufficient to toll the statute. Here, though the instrument was addressed to Mr. Smith, it was written in the presence of Mr. Parker and the duplicate handed to him as soon as completed. What did Mr. Van Dyke intend? That the instrument should not be deemed completed? He said nothing of the kind to Mr. Parker. On the contrary, he handed it to him as a complete instrument, and Mr. Parker had the right to rely upon its being such an instrument. When Mr. Van Dyke handed this instrument to Mr. Parker with his duplicate signature on it, he represented as fully that it was his act and intended to be his instrument as if he had said so in express terms. Certainly Mr. Parker was entitled to so believe and under the authorities heretofore cited with respect to the right to adopt anything as a signature, or to treat anything typewritten or otherwise as the act of the party whose name appears on the document, the Court was justified in holding as a legitimate inference from the testimony and all the surrounding circumstances that Van Dyke intended this to be a complete instrument, and intended that Parker should so understand it. If so, the typewritten signature is as much his signature as if he had written it with his own hand.

There is nothing in the physical condition of the instrument which would preclude the idea that the typewritten signature was intended as the signature of the defendant. In the first place the signature is that of an individual. As shown by the authorities cited, he could adopt a typewritten signature as his own. There is no rule we know of regulating the distance between the end of the written instrument and the signature. There

is no line which would indicate that a written signature was intended. It is a very different proposition that those cases involving signatures by corporations where the corporate name was typewritten on the instrument under circumstances that indicated that it was intended to be signed by some officers of the corporation. Such are the cases cited by the appellant. Thus, in *Richmond Standard Steel Spike & Iron Company v. Chesterfield Coal Company,* 160 Fed. 832, the contract was signed by the name of the corporation in typewriting and two lines underneath for the signatures of the officers. It was held that under these circumstances the contract had not been signed by the corporation and did not take effect. Moreover, there was a finding of fact by the trial court that the contract was not signed by the court or its duly authorized agent in that behalf, and as the Circuit Court of Appeals remarked,

> "We do not feel that we would be justified under the circumstances of this case in interfering with this finding of fact. We might enlarge upon the question presented by discussing the difference between the rules which should be applied to individual liability accruing from subsequent adoption of a signing or signature to an obligation and that of a corporation. An individual acts for himself and upon his own responsibility, and he is at liberty to recognize or adopt a signature as his own, and thereby bind himself by the terms of the paper or instrument to which it is attached. But corporations act through their legally constituted agents or instrumentalities, and therefore, in order to bind the latter under the principle of adoption, it would, in our opinion at least, be necessary that the formal method required in execution of written obligations by a corporation should in the outset be observed."

XI.

The So-called Carbon Copy Was Admissible Without Production of the Original.

Reference is made in the appellant's brief to the claim that the instrument of January 1st, 1927, offered and ultimately received in evidence, was a carbon copy and not the original. The Court has found as a legitimate inference from the conduct of the parties, and particularly of Mr. Van Dyke, that Van Dyke intended to adopt the typewritten signature at the foot of the instrument as his signature and thus in fact sign the instrument. The so-called carbon copy, of course, had the same typewritten signature. It was necessarily made at the same time and by the same mechanical operation. The authorities, except in Texas, are practically unanimous to the effect that the so-called carbon copy is a duplicate original and may be introduced in evidence without accounting for the first copy.

Maston v. Glen Lumber Co., 65 Okla. 80, 163 Pac. 128;

De Michele v. London & Lancashire Fire Ins. Co., 40 Utah 312, 120 Pac. 846;

Engles v. Glocker, 127 Ark. 385, 192 S. W. 193, 22 C. J. 1024, Sec. 1314, 2 Wigmore on Evidence, 1476, Sec. 1232.

And this rule must be especially applicable where the party signs both copies, or, as in this case, adopts a typewritten signature which appears on both copies.

XII.

The Effect of the Defendant's Absence From Arizona.

Mr. Van Dyke's letter or instrument was written on January 1st, 1927. If this instrument had the effect we claim for it, it stopped the running of the statute of limitations and started it anew, and the plaintiff would have four years from that date in which to bring suit. The complaint was actually filed, and suit commenced on the 21st day of January, 1931, 20 or 21 days after the expiration of four years from January 1st, 1927. To negative this apparent running of the statute, the plaintiff pleaded that the defendant, Van Dyke, was without the limits of the State of Arizona for several months in each year between 1927 and 1931. [Tr. p. 18.] Section 2066, Revised Code of Arizona, 1928, provides that "When a person against whom there shall be a cause of action shall be without the limits of this state at the time of the accruing of such action, or at any time during which the same might have been maintained, such action may be brought against such person after his return to this State, and the time of such person's absence shall not be accounted or taken as a part of the time limited by the provisions of this Chapter."

There has been much discussion in this case concerning the character of the absence that would toll the statute. The section above quoted is practically the same as Revised Statutes of Texas, 1911, Article 5702, and the courts of that state have held that a temporary absence is sufficient, and that the time of the absence of the party against whom the action was brought is not a part of the period of limitation; that repeated absences

might be added together and the entire time deducted from the period of limitation provided by the statute. Such was the rule set forth in *Fisher v. Phelps,* 21 Texas, 555, and this rule was adhered to down to the comparatively late case of *Koethe v. Huggins,* 271 S. W. 143. The question is set at rest in Arizona in *Connor v. Timothy,* 33 Pac. (2) 293, (not yet officially reported), in which it was held that temporary absences tolled the statute.

The Court has found on abundant evidence that Mr. Van Dyke was without the limits of the State of Arizona for at least six months between the first day of January, 1927, and the time of the commencement of the action, and this being much more than the twenty or twenty-one days necessary to be accounted for is to be taken out of the period of limitation and forms no part of it. The four years had therefore not run at all from the time of the making of the instrument of January 1st, 1927, until this action was commenced.

XIII.

Steinfeld v. Marteny.

So much reliance is placed by the appellant in his brief upon the case of *Steinfeld v. Marteny,* 40 Ariz. 116, 106 Pac. (2nd) 367, and it was so repeatedly pressed upon the attention of the court below, that it may be well to analyse at some length that decision to see what it actually holds and how far it goes.

The action was brought upon a promissory note made by one William M. Marteny, of whose will the defendant was executrix, on September 8th, 1923, payable 180 days

after date. The note was acquired by Mr. Steinfeld from the original payee and presented to the defendant as executrix for allowance and by her rejected. The defendant pleaded the six year statute of limitations of Arizona, and, as stated by the Court, the lapse of time was more than six years unless the decedent in some way had tolled the statute. It will be observed that this was an Arizona contract and was governed entirely by the laws of Arizona. Three reasons were asserted why the statute had not run; first, that the note sued on was a renewal note and in consideration of such renewal the defendant agreed in said note to waive the statute of limitations; second, that the Tucson Cattle Loan Company, the original payee in the note, had on March 6th, 1924, extended the time of payment for a period of six months from that date; and, third, that the bank to which the note had been assigned by the Cattle Loan Company as collateral had on December 4th, 1924, extended the time of payment until December 4th, 1925. By an amended complaint the second of the above named reasons was omitted and the consideration for a waiver of the statute of limitations was alleged to be the acceptance of the note sued on without the signature of the maker's wife, who had been a co-maker of the note of which it was a renewal and that the bank which held the Cattle Loan Company's note as collateral had renewed from time to time the note of that company and thereby automatically extended the time of payment of the collateral note. Later, by further amendment the plaintiff alleged that in consideration of the extension of the time of payment of the note the maker had in signed writing acknowledged to the loan company the justness of its claim on the note and the debt represented thereby, agreed to pay

the same and waived the statute of limitations, and that on various dates, the last one being alleged to be May 7th, 1926, the maker in writing acknowledged the justness of the debt and agreed to pay the same.

In accordance with its previous decisions the Supreme Court of Arizona held that the agreement contained in the note itself to waive the statute of limitations was invalid, thus eliminating that particular reason alleged by the plaintiff. The Court also held that the periodic renewal of the Cattle Loan Company's note by the bank which held it as collateral did not automatically extend the time of payment of the note sued on. It was also held that under the Arizona statute the plaintiff might not prove an oral extension of the note, the maker of the note being dead and the plaintiff not being permitted to give testimony with respect to such agreement. Thus these particular reasons were eliminated by the ruling of the Court with respect to them, and the case did not refer to the other claims made that the statute had been tolled.

Of the remaining objections, the first was that it was a written agreement between the Cattle Loan Company and Marteny extending the time in which to make payment. No such agreement was produced and in the language of the Court "no witnesses positively stated that there was such an agreement." Even the witnesses who gave testimony on the subject differed in their recollection of it. The agreement was not reflected on the Cattle Loan Company's books and there was nothing except the

vague testimony of the recollection of certain persons who had to do with the transaction. The Court held, therefore, that there was not sufficient evidence of any such written agreement and that the court below was justified in so holding and in rejecting proof of the contention of the alleged agreement and in striking out all the evidence concerning it. This left the only question that of the acknowledgement of the justness of the debt by Marteny. To support this claim several letters written and signed by Marteny and addressed to the loan company were offered in which Marteny asked generally for leniency or expressed the hope that he would be able from cattle sales and sales of his ranches if necessary to reduce or pay off what he owed. There was also produced a financial statement written and signed by Marteny listing his assets and liabilities, which included an item of $38,410.00 owing to the Cattle Loan Company and in connection with this loan company's ledger account with Marteny was introduced, showing that the note sued on was one of the notes of Marteny which it held. The total figures, however, of the account with Marteny was much less than stated by Marteny in his financial statement. The Court then, after quoting *Sec. 2068 Revised Code of Arizona, 1928,* held that the exclusive method of tolling the statute under this action was by signed written acknowledgement of the justness of the claim made subsequent to the accrual of the right of action, and either before or after the bar, that the acknowledgement must designate the particular subject or

demand to which it refers and that a general acknowledgement of indebtedness without specifying the extent and nature thereof is insufficient. None of the letters introduced, the Court held, specifically referred to the note sued on. They were mere general admissions and acknowledgements of an existing indebtedness and were too general and loose to be regarded as an acknowledgement of the justness of this particular note. The real reasons for affirming the judgment appealed from were those above stated. When the evidence fell short of even presenting a question of fact as to the written agreement of extension, and when the instrument relied upon as an acknowledgement of the justness of the debt made no reference to the particular debt sued on, but were mere general expressions of indebtedness, the case was ended. It is true that in construing the statute the Court went further and said that in addition to the acknowledgement of the justness of the debt there must also be an expression of a willingness to pay. It strikes the mind that this latter is something that is not in the statute itself but engrafted upon it by the courts of Texas and is followed by the Supreme Court of Arizona. Nevertheless, it is the construction placed by the latter court upon the Arizona statute and this court is of course bound by the construction placed by the Arizona court upon its own statutes. It was not involved, however, in the *Steinfeld-Marteny* case, since in fact that question was never reached in the consideration of the case. The difference between the situation presented by that case and the one now before the Court will be discussed later, though it would seem to be apparent upon a reading of the opinion in that case and the instrument written by Mr. Van Dyke upon which the contention in this case is based.

XIV.

The Letter (Memorandum) of January 1st, 1927, Is Sufficient to Toll the Statute Under the Law of Arizona.

We have already analyzed the opinion of the Supreme Court of Arizona in the case of *Steinfeld v. Marteny,* 40 Ariz. 116, 10 Pac. (2d) 367.

On a question of the sufficiency of a memorandum of January 1st, 1927, the appellee has always insisted, and still insists, that the law of Iowa and not that of Arizona governs; that a statute governing the sufficiency of a memorandum or instrument to toll the statute of limitations enters into and becomes part of the contract itself, and since these notes are conceded to be Iowa contracts. the law of that state governs. This subject we shall discuss later. At present we desire to consider the effect of this law of Arizona, without waiving in the least the claim that that law does not apply. The instrument, which is the subject of consideration in this case, is lengthy and is set forth several times in the Transcript of Record and counsel have also inserted in the record a photostatic copy. We shall refer, however, to the instrument as printed at page 103, *et seq.* of the Transcript as it is more easily read than the photostatic copy. Contrast this instrument with the situation presented by the case of Steinfeld against Marteny. In that case there was no particular reference to the debt sued upon, nor could its amount be reconciled with any statement made by the maker of the note. In other words, there was a total lack of identification in the debt sued upon with anything contained in the written instrument or letters introduced in evidence in that case. Here we have absolute identifi-

cation. There were only two notes outstanding made by Mr. Van Dyke and Mr. Smith and payable to Mr. Parker, and in the very first sentence of the instrument [Exh. 4, Tr. p. 133] that identification is complete. Mr. Van Dyke says: "Mr. Bascom Parker of Niles, Michigan, arrived in Miami a few days ago asking the settlement of two notes of $5,000.00 each given to him in Chicago August 30th, 1917, in payment for his stock in the Calhoun Timber Company." It is needless to argue that this language completely identifies the indebtedness which is claimed to have been saved from the statute of limitations by the instrument of which it is a part. Mr. Van Dyke then goes on and gives his version of the history of the notes and of the transactions between himself and the St. Ansgar Bank and Mr. Lubiens, and himself and Mr. Smith, and gives his "impression" that Mr. Lubiens and the bank had assumed the note [Tr. p. 106]. But he nowhere states in this memorandum that Mr. Parker had anything to do with these transactions, or that he understood or knew or agreed that the notes were assumed by anyone else. The writer then mentions the fact that he and Mr. Smith had then due and payable a note to the bank or Mr. Lubiens for $10,000.00, and that Mr. Parker had notified him (Van Dyke) that payment must not be paid to the bank until his (Parker's) matter is adjusted. He then later in the letter proceeds: "Our agreement with Mr. Parker was definite. The arrangement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate."

What was Mr. Parker asking? He went to see Mr. Van Dyke about these notes and nothing else. He asked

for payment, or as Mr. Van Dyke put it in his memorandum, asked for settlement of the two notes, which could be nothing but payment, or some arrangement by which they would ultimately be paid. The language of the instrument can lead to no other conclusion than that the writer has identified the notes to which he was referring, and that Mr. Parker was not asked for settlement or payment and was asking for no more than what was right and legitimate. The other two notes were given by Mr. Van Dyke and his associate Mr. Smith to Mr. Parker. Here was Parker asking for payment; here was Van Dyke saying that what Parker asked was right and legitimate. What possible language will more fully amount to an acknowledgement of the justness of the debt? Barring the fact that he did not use the word "just" instead of right and legitimate, his acknowledgement does not differ from the language of the statute. It is not necessary, of course, that any particular language be used if its effect is to acknowledge the justness of the debt.

As to the expression of willingness to pay, it is not necessary that any particular language be used. It is the effect of the language taken as a whole and the inference of conclusion that may legitimately be drawn from it that amounts to an expression of willingness to pay. If from the whole instrument there can be gathered an expression of such willingness, it is enough. Certainly it is not necessary to use such language as "I hereby express my willingness to pay this debt." Counsel employed to prepare an instrument might use such language, but even

then if counsel were employed to see that the statute of limitations was not allowed to run, would probably find some way to do it less subject to attack than a compliance with this particular statute. Instruments which have the effect of tolling the statute of limitations are nearly always in the form of letters or writings prepared by the party himself and not couched in legal phraseology, and still less in the exact language of the statute.

We have here a clear and distinct knowledge of the justness of the debt. We have expressions of regret that they had not been paid. We have an urging of Mr. Smith to pay the St. Ansgar Bank in its offices with a view to paying Mr. Parker. That there was a willingness that Mr. Parker should be paid is beyond question, but Mr. Parker had no claim against the St. Ansgar Bank, he had only a claim against the makers of the note, and there is no possible inference to be drawn from the entire language of this instrument, except that unless some understanding was had with a Mr. Salisbury with reference to the payment of these notes, they should have to be paid and would be paid by the makers. The instrument contains a clear, concise statement that the debt is just and that Mr. Parker is only asking for his rights and what is legitimate and that while the defendants show they had made arrangements for its payment, those arrangements had failed and that an effort should be made to make new arrangements so that plaintiff's notes should be paid. Van Dyke knew that he had signed the notes; knew that they ought to be paid; knew that he was

obligated for that payment, and the mere fact that he sought to bring about that payment by some arrangement with third parties, leaves no inference possible, except that if that could not be done, he and his co-maker would have to pay them. Nowhere in the instrument is there any suggestion of an intention not to pay these notes. Nowhere can it be figured that what he said amounted to a statement that the notes were just, but he would not pay them. On the contrary, all his entire language amounted to an effort to pay them. He owed the St. Ansgar Bank $10,000.00 and he refused to pay that until Parker's notes were settled. If the bank had settled Parker's notes, he would have had to pay the $10,000.00 and the ultimate result, indirect as it might be, was that he and his associates would pay the indebtedness to Parker and the whole instrument breathes not only a willingness, but an anxiety that Parker should be paid, and that those liable to him would see that he was paid.

It has been held that an unequivocable admission that a debt is due and unpaid, accompanied by nothing said or done to rebut the presumption of a promise to pay it, is sufficient to revive the debt against the statute of limitations, and in effect, that the expression of willingness to pay the debt may be inferred from the unequivocable acknowledgment of its justness, unaccompanied by anything that would indicate an intention not to pay it.

Ross v. St. Clair Foundary Corporation, 271 Ill. App. 271;

Sneed v. Parker, 262 Ill. App. 333.

The courts of Texas have recently considered both the sufficiency and what constitutes a new promise or expression of willingness to pay the debt. In *Elsby v. Luna,* 15 S. W. (2nd) 604, the Commission of Appeals of Texas considered the sufficiency of certain letters to toll the statute of limitations and as constituting a new promise to pay the debt. The debt sued upon was evidenced by a promissory note dated October 22, 1914, for $3,000 executed by W. B. Luna and wife and payable to Elsby one year after date. The note was barred by the statute of limitations unless the letters prevented the running of the statute. These letters were quoted by the court in its opinion as follows:

Letter of date November 8, 1922:

> "I received your letter of October 27th, which has reference to my note which has been sent to the City National Bank for collection. In this connection I am sorry to say that it is not possible for me to take up the note, or make a substantial payment on it at this date. I have continually refrained from writing, thinking each week and month, that I would be able to make a satisfactory payment, but so far have not been able to do it. I should regret very much to have you place this note in the hands of an attorney for collection, etc. * * * I am asking that you defer action as to an attorney and have the note returned to you."

Letter of date January 29, 1923:

> "Receipt is acknowledged of your letter of January 17th, and in reply I am forwarding herewith my check for $100.00 on American Exchange National Bank, dated February 8, 1923 * * * I was hoping that you would have had business in Dallas before this, as I should like to have a personal talk with you. Many things could be more readily explained."

Letter of date September 10, 1923:

> "Receipt is acknowledged of your letter of July 21st, which has had my careful consideration. I am pleased to advise you that the matter referred to therein will have my attention about October 1st. I trust that this arrangement will be satisfactory."

Overruling the decision of the Court of Civil Appeals in the same case reported in 6 S. W. (2nd) 375, the court held the letters sufficient and in quoting from decisions said:

> "This new promise need not be expressed in the letters but may be implied from what is written."

and also

> "An unqualified and unequivocal acknowledgment in writing on the part of the debtor, of the existence of the indebtedness, unaccompanied by expressions indicating a willingness to pay same, will raise the implication of a new promise to pay the indebtedness."

This opinion of the Commission of Appeals was adopted by the Supreme Court and the judgment of the Court of Civil Appeals was revised and that of the District Court holding the defendant liable was affirmed.

Again in *Cochran v. J. Coe Lumber Co.,* 82 S. W. (2nd) 684, similar letters were considered by the court and held to be sufficient to toll the statute and to constitute an implied promise to pay the debt.

It is obvious that these late decisions of the Texas Courts state the rule prevaling in that State and explain some of the language used in earlier decisions. Even though the courts of that State have held that in addition to an acknowledgment of the justness of the debt there must be an expression of willingness to pay it, that that expression may be implied and in fact is implied from the acknowledgment of the debt itself.

Again referring to *Steinfeld v. Marteny, supra,* while the court in that case construed the statute and follows what it conceives to be the effect of the Texas decisions it nowhere determined what would constitute an expression of willingness to pay the debt and still less did it hold that such an expression could not be inferred from the acknowledgment of the justness of the debt itself. We venture the prediction that when the case comes squarely before the Supreme Court of the State of Arizona it will follow these late Texas decisions as to what is an expression of willingness to pay the debt and from what language it may be inferred.

XV.

Authorities Cited by Appellant.

We cannot undertake to review and comment on all the authorities cited by the appellant. Reference to a few, however, may not be out of place. Much is said in appellant's brief about the case of *Bell v. Morrison,* 1 Peters 351, and it is cited in a number of the decisions relied upon by appellant. It may be well, therefore, to see what was involved in that case. The opinion bears the great name of Mr. Justice Story and it is still binding law whenever it has application. An action was brought in a Federal Court in Kentucky for the recovery of about $20,000.00 claimed to be due on the sale and delivery of castings. The defendants had entered into a partnership for the purpose of manufacturing and vending salt. The action was brought in 1823, and the statute of limitations applied unless tolled by certain letters passing between the parties and a conversation between the plaintiff and one of the defendants. In 1819 the plaintiff, Bell, went to the house of the defendant Morrison and a conversation occurred with reference to the account for the castings and in the course of which Morrison stated to Bell that his account should be settled and added, "I know we are owing you and are anxious that it should be settled." Certain letters written by Morrison and Butler, two of the defendants, to the plaintiff, were offered, in one of which occurred the following expressions: "I wish whatever is due to you should be paid; I have once more to ask you to follow the advice I am about to offer, viz., to come up here without delay (as Col. Butler may soon be ordered off) and I cannot believe your present suit will answer any purpose." "It is not our wish to keep from

you whatever may be your just due. We have sent for the company books some two or three weeks since; they will come to Louisville by water; and on your and Mr. Wheatley's being there I have no doubt but your account can be adjusted; and that more to your satisfaction than it ever can be from the result of your suit." "I wish your account settled; and I have no hesitation in saying on your coming here it will be done." In another letter from Butler, one of the defendants, to the plaintiff, he informs the plaintiff that on the 20th day of November, 1817, Morrison and Wilkins will be in Hopkinsville "for the purpose of adjusting some of the affairs of the Old Salt Company" and desires that the plaintiff "will be present in order that a settlement will be effected if possible of the account which you set up against the company." In another letter from Butler dated November 8th, 1817, he mentioned the intended meeting on November 20th "for the purpose of adjusting our old account with you." "I hope, therefore, you will be at Hopkinsville for the purpose of enabling us to settle this old affair, to which I am sure all must be most anxious." In another letter of Butler dated October 23rd, 1818, he reminds the plaintiff "about a day of meeting to adjust the account between the former company and yourselves." "If it would suit you to be at Frankfort during the sitting of the Legislature we might possibly come to some understanding on the subject." And in another letter from Taylor, one of the defendants, to the plaintiff dated March 18th, 1818, the writer says: "I received a letter last Monday from Col. Butler inviting me to attend an appointment with you at Hopkinsville on the 26th of this month for the purpose of adjusting the old company account. I shall endeavor to attend at that time, when, if we can

make an arrangement, equally mutual, for the metal I may hereafter want, it can be done."

It will be observed that in these letters there is no attempt to state the amount of the debt nor was there any unconditional recognition of the debt or a promise to pay it. There were vague expressions of the possible existence of an account or claimed account with an expression of the hope of reaching a settlement and it was held that these letters were insufficient to toll the statute of limitations. Moreover, it was held that after the dissolution of the partnership no one partner could bind the partnership by any writing or statement which would toll the statute of limitations if it had already run.

Of course the rule is familiar that the language of the Court in any given case must be considered in the light of the case before the Court. With these vague and uncertain statements nowhere recognizing any particular amount of the debt, furnishing no basis for a fixing of that amount, and in fact implied negatively, the idea that the indebtedness was anything like as large as that sought to be recovered (since one of the defendants had offered to settle for $7,000), it is not surprising that the Court held that the statute was not tolled. But these vague and indefinite expressions are very different from those we have involved in this case.

Shepard v. Townsend, 122 U. S. 231, was a suit brought to recover the amount of two promissory notes and involved the construction and effect of the Maryland

statute of limitations in force in the District of Columbia. After the making of the notes the defendant and others executed an instrument pledging a certain claim against the United States and moneys derived therefrom for the payment of the indebtedness evidenced by the notes. It was said concerning the instrument, that

> "This instrument contains no promise of the defendant personally to pay that debt and no acknowledgment or mention of it as an existing liability."

It was held insufficient to toll the statute.

First National Bank of Park Rapids v. Pray, 288 Fed. 175, in a decision of the Circuit Court of Appeals of the Ninth Circuit, and is of course binding in this jurisdiction. Certain letters were introduced as having the effect of tolling the statute of limitations. It was said of these letters:

> "The correspondence refers to dividends from the bankrupt estate of the White Stores Company in payment on the note of $993.21, being evidence of the payment of one such dividend, and the letters furnished evidence that others were expected which might discharge the entire debt of White Stores Company on the note leaving nothing for the *guarantors* to pay. There was no unqualified or unconditional admission of any debt in any sum and there was not a particle of evidence that there was any principal or intermediate sum or balance with or without interest which the defendant alone was liable or willing to pay."

Circuit Judge Hunt dissented on the ground that the letters were sufficient to take the date out of the operation of the statute of limitations and that the case fell without the decision in *Minifie v. Rowley,* 187 Cal. 481, 202 Pac. 673. The opinion of the majority of the courts seems to be based upon *Clumin v. First Federal Trust Company,* 189 Cal. 248, 207 Pac. 1009. Turning to that case we find it was brought upon a promissory note for $3,000 executed by one Jeremiah Lynch, afterwards deceased. It was claimed on behalf of the plaintiff that the case was taken out of the operation of the statute of limitations by certain writings executed by Lynch. These consisted of checks signed by Lynch, payable to the order of the plaintiff, together with a memorandum made by Lynch on the stub showing the amount of the check and the purpose for which it was executed. One of the checks is set forth in the opinion and the stub shows that it was for quarterly annunity and interest on the notes. It was held that the stubs were not evidence since they were never communicated to the creditor. It was also urged that the execution of the checks and the sending of them to Mrs. Clumin constituted a sufficient acknowledgment or promise to toll the statute, but said the Court:

> "The checks of themselves make no reference to the existence of any debt and contain no promise of any sort to pay money or in discharge of a debt of any character. They also include in the amount stated a sum which the stub shows was intended to pay quarterly interest on a $3,000 debt, but that

> fact nowhere appears upon the check itself; none of them was for that exact sum; they all include sums for other purposes."

It is interesting to note that in the above authorities upon which the Court based its conclusion that these checks were insufficient to toll the statute, will be found a quotation from *Southern Pacific Company v. Prosser,* 122 Cal. 415, 52 Pac. 837, 55 Pac. 145, as follows:

> "The distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged and without intimation of any intent to refuse payment thereof, suffices to establish the debt to which the contract relates, as a continuing contract and to interrupt the running of the statute of limitations against the same."

Other cases are cited of which *Tucker v. Guerier,* 171 Wash. 165, 15 Pac. (2nd) 936, may be taken as a sample in which on account of the difference in wording of the statute of limitations or the different view taken of it by the court there is no application to the present case. Thus, in the case last mentioned the statement is made that "the mere acknowledgment of a debt or the expression of an intention to pay is not sufficient to revive the debt." This is utterly contrary to the view taken by the courts of both Iowa and Arizona with respect to their statutes. Taking the most extreme view of the *Steinfeld-Marteny* case, its construction cannot be governed or influenced by decisions of this character.

XVI.

The Practice Conformity Rule.

Certain matters which counsel for the appellant present consist of references to *Sections 724 and 725, Revised Statutes, United States* (28 U. S. C. A. Title 28, Sec. 724, *et seq.*) commonly known as the Practice Conformity Rule. This act provides that:

> "The practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

The object of this statute is merely to conform to purely procedural matters in actions of law in the Federal Courts to the practice in like actions under the laws of the States. The United States Supreme Court has so declared.

> "The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the federal and state courts of the same locality. It had its origin in the code enactments of many States. While in the Federal tribunals the common-law pleadings, forms and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar require-

> ments of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes."
>
> *Nudd v. Burrows,* 91 U. S. 426, 23 L. Ed. 286.

It had reference solely to matters of procedure. The subsequent section providing that the laws of the State shall be regarded as rules of decision in trials of common law, carries the conformity one step further and makes rules of evidence and statutes regulating the validity of contracts applicable in proceedings in the Federal Courts.

That any of these statutes have the broad effect claimed by counsel is not shown by any of the authorities cited by them nor by any others that we have discovered. Otherwise the settled rule established beyond question that the Federal Courts in matters of general law exercise their own judgment and are not bound by state rules would be wholly inconsistent with the idea suggested. The practice in actions of law in the Federal Court conforms to the State practice. Not in everything but as near as may be. It does not control the conduct of the judge, the manner of instructing juries, the manner of selecting juries, and many other things that are shown on the numerous decisions on the subject in which the Federal Courts are at liberty in their discretion to disregard State practice when they deem it not adapted to the proper administration in the courts of the United States. It was not intended to conform the law of the Federal Courts

to the law of the State, but merely in practice and procedure.

That this is the limit of the effect of these statutes is shown by the very authorities cited by the defendant. An examination of the facts of those cases and the connection in which the language quoted by counsel is used, leads to the conclusion that those cases have no effect upon the question sought to be presented by counsel.

We therefore briefly refer to the authorities cited for the purpose of showing the scope and extent of them and their inapplicability to the present case.

Scudder v. National Bank of Chicago, 91 U. S. 406, 23 L. Ed. 230, was an action brought upon an oral acceptance of a draft. The draft was drawn by a firm in Chicago upon another firm in St. Louis, Missouri, to whom the Chicago firm had sold certain merchandise. The plaintiff bank to whom the draft was presented for discount declined to discount unless it was assured of its acceptance. Thereupon one of the members of the defendant firm who chanced to be in Chicago orally accepted the draft and this acceptance was communicated to the bank, which thereupon discounted the draft. By the laws of Missouri the acceptance of a draft must be in writing, while by the law of Illinois an oral acceptance was valid. It was held by the court that the acceptance having been made in Illinois was valid under the laws of that State and hence was valid in an action on an account in the Federal Court brought on the acceptance, in whatever district it might be brought, and the fact that the Missouri statute required an acceptance in writing did not affect an action brought upon an Illinois

contract of acceptance which would be valid without writing.

Bucher v. Chesire R. R. Co., 129 U. S. 555; 31 L. Ed. 795, was an action brought to recover damages for personal injuries inflicted upon a passenger by the negligence of the railroad company in whose cars he was traveling. The defense interposed that the plaintiff was riding upon the Lord's Day, which riding was not made necessary as an act of necessity or charity and was therefore in violation of the statute of Massachusetts which forbade the doing of anything except works of necessity or charity on Sunday. In an action brought in the Massachusetts court a judgment in favor of the plaintiff had been reversed by the Supreme Judicial Court of Massachusetts and upon the remanding by the court the plaintiff took a non-suit and brought an action in the Federal Court. It was contended that the Massachusetts statute was not binding and did not constitute a defense in an action in a court of the United States, but the court, though not appreciating the public policy that would permit a railway to carry passengers on Sunday and which would deny them any relief if they were injured through the negligence of the company, still held that it was a construction by the courts of Massachusetts of its own statute, long continued and as such must be enforced, though reluctantly, by the Federal Courts. Several of the justices dissented upon the broad ground that while the Massachusetts statute might be a defense in that State, it was no defense anywhere else and especially not in the Courts of the United States.

Leffingwell v. Warren, 67 U. S. (2 Black) 599, was a case where the court merely applied a statute of Wis-

consin fixing the *time* within which a certain action created by the laws of the State should be brought.

Ex Parte Fisk, 113 U. S. 713, 28 L. Ed. 1120, was a petition for a writ of habeas corpus. A state statute provided that a party to a civil action at law might be examined before trial. Being a party to a suit pending in the Federal Court, Fisk was sought to be examined by the opposite party under the state statute. It was held that he could not be examined before trial because the state statute was in conflict with a statute of the United States which provided that a trial should be conducted in open court upon oral testimony of witnesses or by depositions.

Connecticut Mutual Life Ins. Co. v. Union Trust Co., 112 U. S. 250, was an action upon a life insurance policy. It was held that the statute of New York providing that communications to physicians should be privileged applied to actions at law in the courts of the United States.

McNeil v. Holbrook, 12 Peters 84, 9 L. Ed. 1009, was a suit upon four promissory notes, three of which had been assigned and endorsed to the plaintiff by the original holders. The plaintiff offered proof of an admission of liability on the part of the defendant but gave no proof of the genuineness of the signatures upon the notes or of the endorsers. A statute of the State of Georgia dispensing with proof of handwriting of a note or the endorsements thereon was held applicable to cases brought in a court of the United States.

Simms v. Hundley, 6 Howard 1, 12 L. Ed. 319, was an action brought upon a protested obligation. The statute of Mississippi provided that a certificate of protest made

by a notary public under his seal should be admissible without further proof and without producing the notary public as a witness. It was held that this statute applied to proceedings at law in the courts of the United States and that such a certificate was rendered admissible under the Mississippi statute.

The case of *Walsh v. Mayer,* 111 U. S. 31, was upon a negotiable promissory note made in New Orleans, Louisiana, secured by mortgage of real estate in Mississippi, the maker being a citizen of Arkansas and the promisee a citizen of Louisiana, and no place of payment being named in the note. Suit was brought in Mississippi. The defendant sought to apply certain payments of interest which was usurious under the law of Louisiana upon the note and also pleaded the statute of limitations. In this situation, with no place of payment named, the court held that the statute of limitations of Mississippi was properly applied but that the statute had been tolled by certain letters passing between the parties. In passing, it may be suggested that the letters which were held to toll the statute as set forth on *Page 34 of 111 U. S.,* are instructive as to what is necessary to accomplish that end. They are much less specific and definite than the document prepared by Mr. Van Dyke and involved in this case.

It has thus been seen that most of the cases cited by counsel merely relate to the effect of state statutes relaxing to some extent the existing rules of evidence in actions at law. In other words, the statutes involved merely prescribe what foundation would be sufficient to permit a document to be introduced in evidence or what should be deemed privileged communications between

those holding confidential relations or what should constitute *prima facie* evidence of some fact necessary to be proven. The other cases are (1) involving merely the *time* within which a certain kind of action which has statutory origin should be brought and (2), the effect of the Sunday law of Massachusetts. As to this last, the basis of the decision is that there was a statute in Massachusetts which forbade traveling on Sunday except in case of necessity or for charitable purposes and imposing a penalty for so doing. Contrary to the decisions of most of the states, even those having similar statutes, the Massachusetts courts had held in a considerable number of cases that a violation of this Sunday law constituted a defense to an action brought against a carrier for its negligence in injuring a passenger. Except as bound by repeated decisions of the State Court in like cases connected with this statute, the court had held that this was no defense.

> *Philadelphia, Wilmington & Baltimore Ry. Co. v. Philadelphia & Havre de Grace Steam Tow Boat Co.,* 23 Howard, 209.

In the subsequent case of *Bucher v. Chesire Ry. Co. supra,* the court reluctantly yielded to what they termed the repeated decisions of the highest court of Massachusetts. That the Supreme Court of the United States considered those decisions unjust is shown by its opinion, and two justices dissented in toto on the ground that it was a question of general law upon which the Federal Courts were at liberty to follow their own convictions,

but the majority of the court felt compelled to follow the rule as stated by the Massachusetts court, their reason being given in the following language:

> "We are of the opinion that the adjudications of the Supreme Court of Massachusetts, holding that a person engaged in travel on the Sabbath day, contrary to the statute of the State, being thus in the act of violating a criminal law of the State, shall not recover against a corporation upon whose road he travels for the negligence of its servants, thereby establish this principle as a local law of that State, declaring, as they do, the effect of its statute in its operation upon the obligation of the carrier of passengers. The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject."

There can not be claimed to be repeated decisions of the Supreme Court of Arizona, whatever effect may be given to the one decision upon which counsel so strongly relies. None of the cases cited goes so far as to hold or even to furnish any reasoning in support of the idea that a Federal Court may not exercise its own judgment as to what statute of limitations is applicable or what the effect of statutes governing, not the mere *time* within which a suit must be brought, but the substantive effect of the statutes which enter into and become a part of the contract would have in fixing the point at which such time shall begin.

XVII.

The Sufficiency of the Written Acknowledgment Is Governed by the Laws of Iowa.

The notes, while dated Chicago, Illinois, and perhaps signed there, were payable in a bank in the State of Iowa. The contracts evidenced by the notes were to be performed in Iowa. They were therefore Iowa contracts. As was said in *Thompson-Houston Electric Co. v. Palmer,* 52 Minn. 170, 53 N. W. 1137,

> "Although casually signed in Missouri, the notes were delivered and were payable in Illinois; and it is not questioned that they are Illinois contracts, and as respects their nature and obligatory force, governed by the laws of that state."

The question what law applies, whether that of Arizona or Iowa, has been discussed at length in the opinion of the trial court upon the demurrer, which is found on Pages 27 to 37 inclusive of the transcript, and to that opinion we refer and adopt it as our argument upon the questions it covers.

It is sometimes said, perhaps too broadly in some cases, that the statute of limitations of the state in which the suit is brought applies, or that *lex fori* governs matters of that character. To some extent this is undoubtedly the correct rule. As to the mere *time* in which the action is to be brought, the law of the state in which the action is brought governs, save as to cases where the fixing of the time is a part of the act creating the right of action. Substantive matters going to the effect of the contract itself or the effect of the conduct of the parties with respect to that contract are governed by he law of the state where the contract is to be performed and by those laws their validity or effect

is to be determined. As said by the Supreme Court of Utah,

> "The law of the forum controls as respects the cause of action so far as the *time* within which it must be enforced is concerned, but the law of Nebraska controls as respects the time within which the cause of action matured or arose, under a contract made in pursuance of its laws." (Italics ours.)
>
> *Crofoot v. Thatcher,* 19 Utah 212, 57 Pac. 171.

The Iowa statute of limitation applicable to this case, found in Code of Iowa, 1924, which seems to have been in effect at the time of the making of these notes, is contained in the following sections:

> "11,007. Period Of.—Actions may be brought within the times herein limited respectively after their causes accrue, and not afterwards, except when otherwise specially declared.
>
> * * * * * * * * *
>
> "Written Contracts.—Judgments of Notes Not of Record—Recovery of Real Property. Those founded on written contracts or judgments of any courts, except those provided in the next subdivision, and those brought for the recovery of real property within ten years.
>
> * * * * * * * * *
>
> "11,018—Admission in Writing—New Promise. Causes of action founded on contract are revived by an admission in writing signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same."

The general principles applicable to actions brought in one state from rights acquired in another are set forth in *Northern Pacific Ry. Co., v. Babcock,* 154 U. S. 190, 38 L. Ed. 958, as follows:

> "The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto.*"

In volume 17 of *R. C. L.* at page 697, the author states:

> "It is a fundamental principle of law that remedies are to be governed by the laws of the country where the suit is brought, although matters of substantive law are controlled by the *lex loci contractus* or the law of the jurisdiction in which the cause of action arose, among which are the time when a cause of action on a contract arises, and the character, construction and validity of the contract."

So far as time is an element of the statute creating the cause of action or governing the time within which it may be brought, the following cases are instructive:

Theroux v. Northern Pacific Ry. Co., 64 Fed. 84, 12 C. C. A. 52;

Brunswick Terminal Company v. National Bank of Baltimore, 99 Fed. 635; 40 C. C. A. 22.

This principle has been applied in various cases. Thus, a note executed in Nebraska and sued upon in Utah was involved in the case of *Crofoot v. Thatcher,* 19 Utah, 212, 57 Pac. 171. The statute of limitations was pleaded. The note was payable on demand. By the law of Nebraska an actual demand was necessary before the note became payable. By the law of Utah, as in Arizona, a demand note is payable from its date and the statute of limitations immediately commences to run. It was held that the note was governed by the laws of Nebraska and that the statute of limitations did not commence until an actual demand was made for payment.

So certain bonds were held to be governed by the law of the state where made with respect to the rate of interest.

U. S. v. North Carolina, 136 U. S. 211, 34 L. Ed. 336.

So where the laws of two states differed as to the time of the accrual of the right of action, the law of the state where the contract was made or was to be performed prevails.

Glenn v. Liggett, 135 U. S. 533, 34 L. Ed. 262.

And so the statute of frauds of the state where a contract is made governs the rights of the parties under the contract, and if invalid because not in writing in the state where made it is unenforcible in another state, even though by the laws of the latter state it would be valid if there made.

Wilson v. Lewiston Milling Co., 150 N. Y. 314, 44 N. E. 959.

And a complaint based upon a contract executed in the State of Kansas and sufficient under the laws of that state was held valid in an action brought in Massachusetts, even though it would not be valid under the laws of the latter state.

> *Hancock National Bank v. Ellis,* 166 Mass. 414, 44 N. E. 349.

In *Sterrett v. Sweeney,* 15 Idaho 416, 98 Pac. 418, the action was based upon promissory notes executed and payable in the State of Washington. By the law of that state a partial payment tolled the statute of limitations and started it to running anew. The maker of the notes made certain payments. An action was later brought in the State of Idaho where part payment did not toll the statute. The statute of limitations of Idaho was pleaded. It was held that the law of Washington entered into and became a part of the contract evidenced by the notes and that the partial payments prevented their being barred even though had they been Idaho contracts an entirely different rule would have been applied. As the court said:

> "If the notes sued upon were Washington contracts, then the laws of the State of Washington became a part of said contracts, and the effect upon such contracts of the payments made after the notes were due and before the statute of limitations had matured, was to fix a new date from which the statute would begin to run."

It has been sought to distinguish this case for the reason that the maker of the note went to Idaho from Washington and there made the payments, but this was a mere incident referred to because it took place. The basis of the court's decision was the effect of the part payments on notes made and payable in Washington. It was the effect of the Washington law upon Washington contracts, and not the immaterial circumstances under which the payment was made that elicited from the court the statement of the rule announced in the opinion.

In a case involving a similar question where part payments were relied upon to toll the statute of limitations which had that effect in Kansas where the notes were payable, but not in Missouri, where they were sued upon, it was said:

> "So the consequence of a part payment made in Kansas is to be determined by the law of Kansas, not by the law of Missouri."
>
> *Theis v. Wood,* 238 Mo. 643, 142 S. W. 431.

Limitation of the time within which an action may be brought is of course purely statutory. So, exceptions or matters that take a particular case out of the statute, are also statutory. The law of the forum applies to the mere time in which the action may be brought. Statutes which prescribe the effect of certain things, like part payment, acknowledgment of the debt, new promise, are a part of the substantive law which entered into the contract and

govern the rights of the parties to it no matter where the suit may be brought. This is illustrated by the case of *Theis v. Woods,* 238 Mo. 643, 142 S. W. 431, in which it was held that the effect of part payment as to taking the case out of the statute of limitations must be determined by the law of Kansas where the contract was made, but that the mere time for bringing the action was governed by the law of Missouri where the action was brought.

There can be no difference in principle between the rule relating to the effect of the part payment and the rule relating to the character of writing necessary to toll the statute. The parties made an Iowa contract. The contract was governed by the laws of Iowa. That law entered into and formed part of the contract. The substantive things, like the effect of part payment, the character and contents of an instrument necessary to set the statute to running again, the time of accrual of the right of action, and other things that might readily suggest themselves to the mind, are governed by the laws of the state which is the situs of the contract.

Indeed, a New York court has unqualifiedly held that a suit upon a contract to pay a trustee a monthly sum for the support of the wife, the 17-year statute of limitation of Connecticut where the contract was made was the statute that governed instead of the statute of New York where the suit was brought.

Mayncke v. Mayncke, 279 N. Y. Supp. 864.

XVIII.

The Claimed Practical Construction.

As we understand the argument of counsel, it is claimed that the parties placed upon the instrument of January 1st, 1927, what is asserted to be a practical construction and that is, that the instrument was understood by the parties to mean merely an agreement that Van Dyke would not pay the St. Ansgar Bank until the claim of Parker was adjusted. It must be borne in mind that whatever transactions took place between the St. Ansgar Bank and Van Dyke and Smith were between themselves and no one else. There is not a particle of evidence that Mr. Parker was a partner to those transactions or had anything to do with them or even knew of them prior to the dictating of the letter by Mr. Van Dyke. Mr. Parker testified that he went to Miami, Arizona, presented the matter of the notes to Mr. Van Dyke, and that they went to Phoenix, stayed there overnight and returned the next day; and that the letter of January 1st, 1927, was dictated after the return from Phoenix, and on January 1st he left Miami for Globe and took the sleeper out of Globe. [Tr. p. 197.] Mr. Van Dyke testified that the letter was dictated before the Phoenix trip. While the doctrine of practical construction is well recognized and applies wherever it should apply, there is nothing to invoke any such rule in this case. The parties never construed the instrument, practically or otherwise. It was written by Mr. Van Dyke with whatever legal consequences attached to it, and there was never any attempt made to limit the effect of it. It does not appear that up to the time Mr. Van Dyke dictated the instrument, or at any rate until the conversation between Parker and Van Dyke, that Parker knew anything about Van Dyke and Smith owing

the St. Ansgar Bank $10,000. Some suggestion may have been made about attaching or otherwise holding up that payment in order to secure payment of Parker's notes, but surely an instrument as lengthy and comprehensive as the one written on January 1st, 1927, was not merely understood to relate to that one single matter, that is, the withholding of payment to the St. Ansgar Bank until Parker was settled with. Even that statement would be wholly inconsistent with the later claim that they owed Parker nothing because his debt was barred by the Statute of Limitations, which in itself would be a recognition of the existence of that debt. But the fact is that that was simply a suggestion of Mr. Van Dyke's relating to transactions with which Mr. Parker had nothing to do, but had reference to a possible mode of adjusting Parker's claim. When Parker was advised that Van Dyke owed the St. Ansgar Bank, according to the instrument written by Van Dyke, Parker notified Van Dyke that payment must not be made until his matter was adjusted, a position in which Van Dyke seems to have acquiesced. That the payment of Parker's notes was limited or tied up in any way with the payment due to the St. Ansgar Bank from Van Dyke has no basis either in the instrument or in anything outside of it. Parker had simply come to Miami and presented his notes and asked payment thereof. The instrument written by Mr. Van Dyke starts out with the statement that Mr. Parker had arrived a few days ago and asked a settlement of these particular notes, and then, after stating some other matters and that one note had been paid, Mr. Van Dyke proceeds:

> "The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker for payment at this time".

There is obviously nothing from which there can be inferred any practical construction by the parties contrary to the instrument written by Mr. Van Dyke or limited to one phase of that instrument and naturally there is no finding of the court that there was any such practical construction.

XIX.
The Form of Action.

Arizona is one of those states having a code which abolishes forms of action and provides that the rights of parties shall be determined in a single form of action to be known as a civil action. The complaint is required by the statutes of that state to contain a plain and concise statement of the facts constituting or claimed to constiute a cause of action. The rule is familiar that in states having such codes the party is not required to classify his cause of action or to seek an analogy to some common law form of action. He merely sets forth the facts which he claims entitle him to relief, and if they do the court will award him the relief to which he may show himself entitled. When therefore, the plaintiff sets forth the facts in his complaint, the only question is whether upon those facts he is entitled to the relief sought or any relief regardless of what might be called the form of action. So the second amended complaint [Tr. p. 10 *et seq.*] sets forth the facts claimed to be asserted by the plaintiff. After the allegation of jurisdictional facts, he sets forth the making of the note (taking the first cause of action into consideration); sets forth the instrument which he claimed acknowledges the justness of the indebtedness; sets forth the absences of the defendant for the purpose

of preventing the running of the statute since the memorandum of January 1st, 1927; sets forth his ownership of the note and prays judgment for the indebtedness evidenced thereby. In the second cause of action the same allegations are set forth as to the other note. Whatever may be the rule with respect to bringing the action upon the original indebtedness or upon the renewed promise or instrument preventing the operation of the statute of limitations, or whatever it may be called, this complaint answers every purpose. With the system of pleadings in force in Arizona, where the facts, whatever they may be are set forth, followed by a prayer for whatever relief the plaintiff thinks himself entitled to, a good cause of action is stated if those facts do entitle the plaintiff to some relief regardless of the character of the action, and a complaint of this kind is perfectly good whether the action is brought on the original indebtedness or the new promise.

Cochran v. J. B. Coe Lumber Co., 82 S. W. (2d) 684.

See also as to the general rule:

Johnson v. Moore, 31 Ariz. 137, 250 Pac. 995.

It is respectfully submitted that the judgment should be affirmed.

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